

**Evidence: Third-party defense: Third-party culpability evidence is admissible if it is relevant and if its probative value is not substantially outweighed by the risk of prejudice or confusion.....Revised 12/2009**

When a defendant wants to present evidence at trial suggesting that someone other than the defendant committed the crime, such evidence is referred to as “third-party culpability evidence.” In *State v. Gibson*, 202 Ariz. 321, 44 P.3d 1001 (2002), the Arizona Supreme Court addressed the standard for admissibility of such evidence. In *Gibson*, the defendant was charged with murder. Before trial, the defendant gave notice under Rule 15, Ariz. R. Crim. P., that he wanted to present evidence that a third party actually committed the murder. The State argued that the proffered third-party evidence did not have any “inherent tendency” to connect the other suspects with the crime, relying on *State v. Fulminante*, 161 Ariz. 237, 252, 778 P.2d 602, 617 (1988). The trial court agreed and precluded the defendant from introducing the proffered third-party evidence, and he was convicted.

On appeal, Gibson argued that the trial court improperly precluded the third-party evidence. The Arizona Supreme Court agreed, stating that *Fulminante* did not impose any “special standard or test of admissibility.” *State v. Gibson*, 202 Ariz. 321, 323, ¶ 10, 44 P.3d 1001, 1003 (2002). Instead, the Court said, “The appropriate analysis is found in Rules 401, 402, and 403, Arizona Rules of Evidence.” *Id.* at ¶ 12. First, the court must determine if the proffered evidence is relevant under Rule 401 – that is, if the proffered evidence has any tendency to make any fact at issue “more probable or less probable than it would be without the evidence.”

If the evidence is relevant, it is admissible under Rule 402, unless “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence” under Rule 403. *Id.* at ¶ 13. The Court concluded:

The proper focus in determining relevancy is the effect the evidence has upon the *defendant’s* culpability. To be relevant, the evidence need only *tend* to create a reasonable doubt as to the defendant’s guilt.

*Gibson*, 202 Ariz. at 324, ¶ 16, 44 P.3d at 1004 [emphases in original].

In conducting the Rule 403 balancing test, the higher the probative value of the proffered evidence is, the less probable it will be that the other factors will outweigh the value of the evidence. *Id.* at ¶ 17. In *Gibson*, the Court concluded that the trial court applied the wrong test of admissibility of the proffered third-party culpability evidence, reversed the defendant’s conviction, and remanded the case for a new trial.

Further, in *State v. Prion*, 203 Ariz. 157, 52 P.3d 189 (2002), the Court again found that the trial court erred by precluding the defense from presenting third-party culpability evidence that implicated another man, Mazure, in the murder.<sup>1</sup> The Court found that the proffered evidence “is relevant in Prion’s trial because on its face it may suggest reasonable doubt as to Prion’s guilt. It supports the notion that Mazure had the opportunity and motive to commit this crime and that he may have been in contact with [the victim].” *Id.* at 161-62, ¶ 25, 52 P.3d at 193-94.

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<sup>1</sup> The evidence included the following. Mazure worked with the victim; he had been disciplined for sexually harassing female co-workers, and lied about this to the police. He had attempted to rape a female co-worker, had a violent temper, and had physically fought with women. He was at a nightclub on the night the victim disappeared, and that club was the last place anyone saw her alive. That same day, Mazure rented a new apartment close to the club and close to where her car was found. Finally, the morning after the victim disappeared, Mazure appeared at work “so disheveled and disoriented that he was fired.” 52 P.3d at 193, ¶ 23.

By contrast, in *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002), decided after *Gibson*, *supra*, the Arizona Supreme Court held that the trial court properly excluded proffered third-party culpability evidence as irrelevant, because the proffered evidence did not have any tendency to create reasonable doubt about the defendant's guilt. In that case, two robbers – one white or Hispanic and one black – committed three robberies during one of which a person was shot and killed. Phillips, who was white, and his codefendant Finch, who was black, were charged with all three robberies and the murder. Phillips proffered third-party evidence that Locklin, a black man, had confessed to committing the first robbery. The trial court precluded the proffered evidence and Phillips was convicted. On appeal, he argued that the trial court erred by precluding the evidence. The Arizona Supreme Court found no error, stating that the proffered evidence was irrelevant because, even if Phillips could connect Locklin to that robbery, evidence that Locklin was the black robber in that case “would not exculpate Phillips, who could have been the white or Hispanic man involved in the robbery. ... Because Phillips’ proffered evidence did not have a tendency to create a reasonable doubt as to Phillips’ guilt, the evidence was not relevant.” *State v. Phillips*, 202 Ariz. 427, 434-35, ¶ 28, 46 P.3d 1048, 1055-56 (2002).

Since *Gibson* was decided, Arizona courts have upheld several cases in which proffered third-party defense evidence was excluded. See, e.g., *State v. Davolt*, 207 Ariz. 191, 211, 84 P.3d 456, 476 (2004) [Evidence that victim was “unpopular,” offered to support a third-party defense, properly excluded]; *State v. Dann*, 205 Ariz. 557, 569, ¶ 39, 74 P.3d 231, 243 (2003) [Evidence of victim’s involvement in the drug trade and presence of drugs in his body at time of death, offered to support a third-party defense,

properly excluded; evidence did not tend to point to a third person's culpability in the murders, had no tendency to establish the cause of the deaths, and may well have wasted time and confused the issues at trial]; *State v. Blakley*, 204 Ariz. 429, 442, ¶ 68, 65 P.3d 77, 90 (2003) [Fact that defendant's cousin had committed arguably similar crimes, offered to support a third-party defense, properly excluded; defendant proffered no evidence suggesting cousin was present at crime scene in this case]; *State v. Davis*, 205 Ariz. 174, 179-180, ¶¶ 27-28, 68 P.3d 127, 131-132 (App. 2002) [Witness's possession of a portable meth lab after the murder and victim's erroneous belief that she was pregnant, offered to support third-party defense, properly excluded; the evidence did not make the existence of any fact of consequence to the defendant's guilt more or less probable].

Third party defense evidence may be admissible over a Rule 403 objection if the proffered evidence is required in order to provide the defendant "a meaningful opportunity to present a complete defense". *Clark v. Arizona*, 548 U.S. 735, 789-790, 126 S.Ct. 2709 (2006), quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528 (1984).